

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RUDOLPH (DEC'D) AND LORETTA ZAPKA	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1980, 1981 and 1982.	:	

Petitioners, Rudolph (Dec'd) and Loretta Zapka, 29 Durand Place, Manhasset, New York 11030, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1980, 1981 and 1982 (File No. 804111).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on June 21, 1988 at 9:15 A.M., with all documents to be submitted by July 21, 1988. Petitioners appeared by Samuel Oser & Associates, P.C. (Samuel Oser, C.P.A.). The Audit Division appeared by William F. Collins, Esq. (Irwin Levy, Esq. of counsel).

ISSUE

Whether petitioners have established that they were residents of the State of Florida and not of the State of New York during the years 1980, 1981 and 1982.

FINDINGS OF FACT

1. Petitioners, Rudolph (Dec'd) and Loretta Zapka, husband and wife, moved to New York State in or about 1975. This move to New York was made in connection with Mr. Zapka's transfer as an employee of Sears, Roebuck and Co. ("Sears") from Chicago, Illinois to New York. Prior to this move the Zapkas had lived in Chicago, Illinois for the major portion of their married life.

2. Upon moving to New York, the Zapkas purchased a home located at 29 Durand Place, Manhasset, Long Island, New York. Mr. Zapka continued to work for Sears until his retirement in late 1978.

3. Upon Mr. Zapka's retirement from Sears, the Zapkas contacted a personal friend who owned a fully furnished condominium located at 2121 North Ocean Boulevard, Boca Raton, Florida. Petitioners arranged to lease this condominium in Florida on a renewable, annual basis commencing in 1979 at a monthly rental payment of \$745.00.

4. Commencing on January 6, 1979, and continuing through Mr. Zapka's death in January of 1983, petitioners' general pattern was to live in this condominium in Florida from January through approximately May. Petitioners would then drive to the northeast and, during the month of June, petitioners would visit their two daughters, living respectively in Springfield, Virginia

and Norwood, Massachusetts, for a period of approximately two weeks each. Petitioners would then spend an additional period of approximately two weeks visiting friends and relatives in Chicago, Illinois. Thereafter, in or about mid-July, petitioners would drive to New York and live in their Manhasset, Long Island home until approximately mid-October, at which time petitioners would return by car to the Florida condominium. As noted, the Florida condominium was furnished, and petitioners' personal belongings and furnishings remained in the Manhasset, Long Island home.

5. Petitioners did not purchase the condominium they stayed in or any other residence in Florida, but continued to lease the same condominium through the period in question. Likewise, petitioners did not sell their home in Manhasset, Long Island, but continued to own said home. These decisions were both based upon the advice of their accountant and tax adviser (and representative herein), one Samuel Oser, C.P.A. Mr. Oser's advice not to purchase a condominium in Florida was based on the recommendation that since interest rates during said period were comparatively high, petitioners could (and did) earn more money in interest on their investments than they were paying to rent the condominium. Further, Mr. Oser advised petitioners not to sell their Manhasset, Long Island home based upon his belief that the value of said home would increase dramatically over the course of time. Mr. Oser estimated the value of the Manhasset home at approximately \$375,000.00 in the early 1980's, and estimated its current value at approximately \$750,000.00.

6. At or about the time of initially leasing the condominium in Florida, petitioners filed certain documents in the State of Florida, including a Declaration of Domicile (filed December 20, 1978). Petitioners also registered to vote in Florida, although it is not known if petitioners in fact voted during the years in question. Petitioners registered their automobile in Florida, and obtained Florida driver's licenses. Petitioners maintained bank accounts both in Florida and in New York State, and also had certain investments administered through a bank in Chicago, Illinois. Petitioners maintained a safe deposit box in Manhasset, New York. The Zapkas filed Florida intangible tax returns for each of the years in question, listing their address thereon as 2121 North Ocean Boulevard, Boca Raton, Florida. Petitioners' Federal income tax returns for the years in question were also filed listing the same address.

7. In or about November of 1982, while in Florida, petitioner Rudolph Zapka became seriously ill, suffered a stroke, and returned to New York for surgery and hospitalization. Mr. Zapka died shortly thereafter on January 26, 1983. Mr. Zapka's will had been drafted in Florida, and was also probated in Florida. For purposes of the probate proceeding, Mr. Zapka was deemed a domiciliary and resident of Florida. Mr. Zapka's body was buried in Chicago, Illinois. Mr. Zapka's estate paid New York State estate tax in the amount of \$4,593.06, presumably based upon the value of the Manhasset, Long Island home. Subsequent to Mr. Zapka's death, Mrs. Zapka terminated the lease of the Florida condominium and has lived at the Manhasset, Long Island home at all times thereafter.

8. The Zapkas had no relatives living in New York during the years in question, nor were they engaged in any business activities in New York during the years in question. Petitioners owned certain securities as an investment (15 units of Municipal Securities Trust Series 6). While such securities were physically located in Manhasset, New York, they were not used in the conduct of any business.

9. During the years in question, petitioners were members of the North Hempstead Country Club in Port Washington, Long Island, New York. There is no evidence of any other club memberships nor of any religious affiliations either in New York or in Florida.

10. Form W-2P (Statement for Recipients of Periodic Annuities, Pensions, Retired Pay or IRA Payments) issued to petitioner Rudolph Zapka listed petitioners' Manhasset, New York address.

11. There is no evidence that petitioners ever offered the Manhasset home for sale or made a purchase offer on any residence in Florida. Although not fully clear from the record, it appears that petitioners did not seek the advice of Mr. Oser regarding sale of their Manhasset home and purchase of a Florida residence until 1982.

12. For the year 1979, petitioners filed a New York State Income Tax Nonresident Return (Form IT-203) listing thereon their address as 2121 North Ocean Boulevard, Apartment 808, Boca Raton, Florida. This return was completely filled out and reflected a refund due in the amount of \$1,446.00, which refund was issued to petitioners. For the year 1980, petitioners also filed a Form IT-203, attaching thereto the pre-printed label showing the North Ocean Boulevard, Boca Raton, Florida address. The only other information on this return was a handwritten notation on the front of the form stating, "Not a Resident of New York State". This 1980 form was not signed and, other than the aforementioned handwritten notation, contained no information or entries as to petitioners' filing status, income, deductions or exemptions, etc.

13. On August 8, 1986, the Audit Division issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the years 1980 and 1981 in the aggregate amount of \$3,980.70 plus interest. On the same date, the Audit Division issued a Notice of Deficiency to petitioners asserting additional personal income tax due for the year 1982 in the amount of \$951.60 plus interest. A Statement of Personal Income Tax Audit Changes previously issued to petitioners on February 27, 1986 indicated the basis for issuance of these two notices of deficiency was the assertion that petitioners were taxable as residents of New York State for each of the three years in question.

SUMMARY OF PETITIONERS' POSITION

14. Petitioners assert that they effected a change of domicile from New York to Florida and thus were improperly issued notices of deficiency upon the premise that they were taxable as residents of New York State. Petitioners assert that their only link to New York State was the home in Manhasset, and that the only reason for issuance of the subject deficiencies was a referral to the Income Tax Unit of the Audit Division based on the estate tax payment made upon Mr. Zapka's death. It is asserted that petitioners lived in Illinois for the majority of their lives, that they did not enjoy living in New York, and that upon Mr. Zapka's illness the only reason for returning to New York was a belief that Mr. Zapka would receive better medical care in New York than in Florida.

15. Petitioners further maintain that the issuance of a deficiency for the years in question is barred by the statute of limitations. Petitioners assert that the return filed for 1980 with its statement thereon that petitioners were not residents of New York was sufficient to place the Audit Division on notice of petitioners' claim of nonresidence, thereby invoking the three-year statute of limitations within which a Notice of Deficiency must be issued.

CONCLUSIONS OF LAW

A. Petitioners did not file New York State tax returns for any of the three years in question including, specifically, 1980. Their submission of a Form IT-203 for 1980, which was totally blank with the exception of an address and the notation "Not a Resident of New York State",

does not constitute the filing of a return. In the absence of filing returns, the general three-year statute of limitations provided for by Tax Law § 683(a) does not govern. Thus, the Audit Division's issuance of the notices of deficiency herein is not time barred (Tax Law § 683[c][1][A]), and petitioners' argument that the statute of limitations bars any or all of the deficiencies in question is rejected.

B. Tax Law § 605 (former [a]), as in effect during the years in question, in pertinent part, provided:

"Resident individual. A resident individual means an individual:

(1) who is domiciled in this state, unless (A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state..., or

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state...."

C. In order "to effect a change of domicile, there must be an actual change of residence, coupled with an intention to abandon the former domicile and to acquire another." (Aetna Nat'l. Bank v. Kramer, 142 App Div 444 [1st Dept 1911].) "The test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it' (Matter of Bourne, 181 Misc 238, 246, affd 267 App Div 876, affd 293 NY 785.)" (Matter of Bodfish v. Gallman, 50 AD2d 457.)

D. 20 NYCRR 102.2(d) provides, in part, as follows:

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In

determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Subdivision (e)(1) of said regulation defines permanent place of abode as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode."

E. In light of the foregoing, both the intention to make a new location one's fixed and permanent home and an actual residence at that location must be present (Matter of Minsky v. Tully, 78 AD2d 955). Moreover, the evidence to establish the required intention to effect a change of domicile must be clear and convincing (cf. Matter of Bodfish v. Gallman, *supra*). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (see , e.g., Matter of Zinn v. Tully, 54 NY2d 713, *rev'd* 77 AD2d 725). An individual's original or selected domicile continues until there is a clear manifestation of an intent to acquire a new one (Matter of Clute v. Chu, 106 AD2d 841).

F. Although it is a close matter, petitioners have not clearly shown that they changed their domicile from New York to Florida. Surface review indicates many steps were taken by petitioners which would tend to support a conclusion that petitioners did in fact change their domicile (e.g., filing of Declaration of Domicile, automobile registration, driver's licenses, voting registrations, etc.). However, weighing all of the evidence leaves an overriding sense that petitioners were a retired couple "wintering" in Florida and were, at most, in the "process" of deciding whether or not to shed their New York domicile. Upon the evidence presented, it cannot be said that petitioners "gave up the old and took up the new". The most obvious factor considered is the retention of ownership of their home in Manhasset, New York and their return thereto for a period of at least three months each year. This factor, coupled with the leasing (as opposed to purchase) of a furnished condominium in Florida, with petitioners' furnishings and personal belongings remaining in Manhasset, militates against concluding that a change of domicile occurred. Petitioners assert these circumstances were occasioned upon the advice of their accountant and tax adviser, based purely on his and their economic analysis of the long-range cost involved in purchasing a condominium in Florida and selling their home in New York. However, the accountant's advice on this score was apparently not sought until 1982, which is the last of the years in question. Thus, it would appear that while petitioners may have been considering a permanent move to Florida prior thereto, they had not determined to make the move permanent. Though petitioners undeniably had established some ties to Florida, there remained strong connections to New York State sufficient to conclude that petitioners had not abandoned their old domicile and taken up their purported new domicile as their permanent home. Finally, petitioners' argument to the effect that the Audit Division accepted petitioners' 1979 New York State tax return filed on a nonresident basis thus serving to preclude the Audit Division from finding petitioners to be domiciliaries of New York State is rejected. It is sufficient to note, in this regard, that the return for 1979 apparently was not selected for audit. Accordingly, on the basis of all of the evidence presented, as reviewed in its entirety, it cannot be concluded that petitioners clearly evidenced a change of domicile from New York to Florida.

Thus, since petitioners were domiciliaries of, maintained a permanent place of abode in and spent in excess of thirty days in New York State during the years in question, they were properly subject to tax as resident individuals.

G. The petition of Rudolph (Dec'd) and Loretta Zapka is hereby denied and the notices of deficiency dated August 8, 1986 are sustained.

DATED: Albany, New York

September 9, 1988

/s/ Dennis M.

Gallihier _____
ADMINISTRATIVE LAW JUDGE

- 1 It is noted that petitioners claimed at hearing to have paid interest accrued on the asserted deficiencies through the end of 1986. Accordingly, any amount due must be reduced to reflect the amount of such interest payment previously made by petitioners. For purposes of the record herein, the dollar amount of said interest payment was not specified.